APPEAL NO. 93441

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A contested case hearing with (hearing officer) presiding was opened in (city), Texas, on April 20, 1993, and the record was closed on May 4, 1993. The sole issue at the hearing was whether appellant (claimant herein) was entitled to mileage reimbursement pursuant to Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 134.6 (Rule 134.6). The hearing officer found that the claimant was not entitled to travel expenses because it was not reasonably necessary for him to travel from FW to D to see a general practitioner.

The claimant appeals arguing essentially that since the 1989 Act entitles him to health care reasonably required by his injury and provides that he has a choice of doctors, the hearing officer erred in failing to find that his reasonable expenses to travel to his doctor should be reimbursed under Rule 134.6. The claimant also contends that the findings of the hearing officer were based upon evidence which should not have been admitted.

The respondent (carrier herein) responds that the decision of the hearing officer was supported by sufficient evidence and should not be disturbed.

DECISION

We reverse the decision of the hearing officer and remand for the further development of evidence consistent with this decision.

It was stipulated that the claimant was injured while in the course and scope of his employment with his employer on October 10, 1991. The claimant testified that at the time of the injury his employer sent him to (Dr. Mc), a physician, who initially diagnosed a wrist strain. Dr. Mc sent the claimant to (Dr. P), a Fort Worth neurologist, who, the claimant testified diagnosed carpal tunnel syndrome and recommended immediate surgery, and who apparently suggested the claimant see (Dr. T), a orthopedic surgeon.

Claimant testified that the recommendation of immediate surgery frightened him and that he was also concerned because neither Dr. Mc nor Dr. P were addressing the pain in his shoulder and back. At this point, according to the claimant's testimony, he called the Texas Workers' Compensation Commission (Commission) and was told that he could see a doctor of his choice. The claimant testified he decided that he wanted to see (Dr. M), a osteopath in family practice, who the claimant trusted because he had been the claimant's family doctor since 1984. The claimant testified he wanted treatment by Dr. M because he felt Dr. M would address all his symptoms, would provide effective treatment because he had effectively treated the claimant in the past, was familiar with his medical condition generally as he already had the claimant's medical records and knew of claimant's allergies and fears. The claimant simply felt more comfortable with this doctor with whom he was more familiar.

There was testimony from (Ms. S), the carrier's handling adjuster, concerning the

claimant's switching his medical care to Dr. M. Ms. S testified that the claimant called her requesting he change his treatment to Dr. M and that she told him "you may do so," but that she also advised him to go to at least one examination with Dr. T because Dr. T was a specialist and it would benefit him to obtain Dr. T's recommendation. Ms. S testified that the claimant agreed to see Dr. T.

The claimant testified that he initially saw Dr. M on October 21, 1991, who did address his shoulder and back symptoms as well as his wrist complaints. Dr. M, according to the testimony of the claimant, started him on course of physical therapy treatment involving heat packs, electrical stimulation and exercise. The claimant testified that initially he received therapy, which was provided at Dr. M's office, five days per week and over time the frequency of these visits was reduced but at the time of the hearing the claimant was still treating with Dr. M twice a week.

The claimant testified initially that he saw Dr. T before seeing Dr. M, but later testified that he saw Dr. T after seeing Dr. M. The claimant testified that the recommendation of Dr. T was essentially the same as Dr. P, namely, surgery on his wrist to relieve carpal tunnel syndrome. The claimant opted instead to continue therapy treatment with Dr. M. Dr. M later sent the claimant to (Dr. E), a Dallas surgeon, who apparently performed arthroscopic surgery on the claimant's shoulder for repair of a rotator cuff tear. Prior to the surgery the carrier apparently requested another opinion concerning surgery with Dr. T who according to the claimant concurred with that recommendation. The claimant apparently continued therapy treatment with Dr. M after this surgery.

The claimant testified that sometime in March or April of 1992 he called the Commission concerning an advance on his benefits because of hardship and during the course of that conversation learned for the first time that he might be entitled to travel expenses for medical treatment. According to the claimant's testimony he called Ms. S who told him to submit his travel expenses to her and he did so. Ms. S testified that she told the claimant to submit his claim for travel expenses in writing she believes in June 1992 and that she sent him a letter, apparently denying to pay travel expenses, in July 1992. Ms. S testified that from the outset she advised him that the carrier would not pay medical mileage. She stated that she told the claimant that treatment with Dr. M was not medically necessary. Ms. S testified that as far as she knew all of Dr. M's charges for medical treatment had been paid by the carrier.

The claimant testified that Dr. M's care had benefited him and in fact had allowed him to return to work. The claimant testified that during his treatment with Dr. M he traveled from his residence in Fort Worth to Dr. M's office in Dallas in his personal automobile. The claimant testified that during his treatment with Dr. M he moved several times but always lived in Fort Worth. The claimant provided an itemized summary showing the dates he traveled along with the miles traveled, as well as showing the amount he spent on lunch in

Dallas on the days he visited Dr. M's office. The claimant testified that he included in some of his mileage figures additional mileage for travel to a pharmacy to have prescriptions filled on the way home from Dr. M's office. This pharmacy was in a Kroger (grocery) store close to his employer. The claimant testified that while there were closer pharmacies to his home, he used this pharmacy because the personnel there were familiar with his employer and his employer's carrier. He testified that when he had tried to use other pharmacies he had difficulty getting his prescriptions filled because these pharmacies were delayed by having to obtain authorization from the carrier.

The claimant is requesting reimbursement for mileage to Dr. M and to the grocery pharmacy as well as meal expense reimbursement in the total amount of $6,597.34.

Under cross-examination the claimant testified that he did not ask the Commission for names of doctors in Fort Worth or seek treatment from doctors in Fort Worth. He stated that he did not have receipts for his meal expenses testifying that he had originally kept the receipts but had been told by Ms. S that all he needed to do was to write down the amount. He also testified that he eats lunch at home on the days he did not travel to Dr. M's office and the detour from Dr. M's office to the pharmacy added 14 miles to his trips home.

The carrier called (Ms. B), who testified that she was a certified insurance rehabilitation specialist and that she had been asked by the carrier to look into what services were available in Fort Worth, Texas, for someone with a rotator cuff tear. She testified that there are thirty-five orthopedic surgeons in the FW area who perform arthroscopic surgery for the repair of rotator cuff tears. Ms. B stated that she had obtained this information by calling the office of every orthopedic surgeon listed in the Fort Worth telephone book and asking the nurse if the doctor performed the procedure. The carrier sought to introduce a list of these surgeons prepared by Ms. B, but the claimant objected that the list had not been exchanged under Rule 142.13. The hearing officer sustained the objection, and Ms. B proceeded to read the list into the record. Ms. B also testified that based on her experience she could state that there were at least twice the number of general practitioners in Fort Worth as orthopedic surgeons, so there were least seventy general practitioners in Fort Worth. Ms. B testified that it is usual for a person to seek physical therapy treatment close to home as travel to therapy can aggravate a physical condition.

Under cross-examination, Ms. B stated that she did not know how many of the thirty-five Fort Worth orthopedic surgeons who she testified surgically repair rotator cuff tears accept workers' compensation patients but from her personal experience she recognized that ten names on her list were names she had seen on reports she had seen in workers' compensation cases. Ms. B testified that she was neither an RN nor a utilization review nurse and that she was not qualified to vouch for the quality of care provided by either the Fort Worth general practitioners or orthopedic surgeons. She further stated under the questioning of the claimant as to whether in her opinion the quality of health care from these

doctors would have been equivalent to the health care he received from his personal physician, "[t]heir health care could be just as good as the health care you're receiving or it could be of lesser quality." Ms. S also testified that a number of doctors on Ms. B's list accept workers' compensation cases.

Rule 134.6(a) states:

> When it becomes reasonable necessary for an injured employee to travel in order to obtain appropriate and necessary medical care for the injured employee's compensable injury, the reasonable cost shall be paid by the insurance carrier. The reimbursement shall be based on the following guidelines:
>
> (1)the mileage shall be greater than 20 miles, one way, to entitle the injured employee to travel reimbursement;
>
> (2)reimbursement shall also be paid based upon the current travel rate for state employees. The shortest route between two points shall be used; and
>
> (3)when travel involves food and lodging, these items will be based upon the current rate for state employees.

Claimant argued that the carrier by authorizing treatment with Dr. M admitted that his care was reasonably necessary and that this was further proven by the fact that Dr. M's care has allowed the claimant to return to work. The carrier argues that it was required to allow the claimant his choice of doctors but was not required to pay for medical travel when other care was available closer to the claimant. The hearing officer concluded as a matter of law that the claimant failed to prove that it was reasonable necessary for him to travel to Dr. M to obtain appropriate and necessary medical care for his compensable injury. In Texas Workers' Compensation Commission Appeal No. 93239, decided May 14, 1993, we affirmed a hearing officer who found that when the claimant had moved to another city to have the help of his family in recuperating from his injury, it was reasonably necessary for him to continue under treatment of the neurosurgical office which had performed his surgery even though the claimant testified that there were closer neurosurgeons and where travel to his treating doctor involved a 500 mile round trip commute. In Texas Workers' Compensation Commission Appeal No. 93264, decided May 7, 1992, we affirmed a hearing officer who found that a claimant who had moved to another city but continued to receive physical therapy in the city in which she was injured was entitled to reimbursement for mileage at the state mileage rate for her 200 mile per trip commute, but not for the cost of a rental car. Most recently, in Texas Workers' Compensation Commission Appeal No. 93361, decided June 23, 1993, we reversed a hearing officer who found that a claimant was entitled to be reimbursed for only the amount of mileage to a nearby specialist when the

carrier had agreed to allow her to change treating doctors to a doctor in a more distant city. In Appeal No. 93361, *supra*, we stated:

It seems to us that when the carrier agreed that claimant could commence treatment with Dr. F, she thereafter became entitled to such travel expenses as are provided for in the 1989 Act and the Commission's Rules, and that if the carrier desired to limit claimant's travel expenses to visit a new treating doctor, it should have insisted that claimant find a new treating doctor closer to her residence. Once the carrier agreed that claimant could commence treatment with Dr. F, it followed that claimant became entitled to such travel expenses as are authorized under the 1989 Act and the Commissions's Rules.

Applying the holding of Appeal No. 93361, *supra*, requires us to reverse the decision of the hearing officer as to the claimant's right to travel reimbursement to Dr. M's office which, according to the uncontroverted testimony of the claimant, was more than 20 miles from his residence at all times he has been treating with Dr. M. In the present case the carrier authorized treatment with Dr. M and certainly did not insist on a doctor closer to the claimant's residence.

In regard to mileage to fill the claimant's prescriptions, we do not find in the record any evidence that the grocery pharmacy was more than 20 miles from the claimant's residence at any time the claimant was under treatment. In any case, since pharmacies, unlike doctors and therapists, are fungible and do not "provide medical care" as it is contemplated in Rule 134.6, we hold that travel to fill a prescription is not reimbursable under this Rule. Since we are unable to determine from the record what portion of the claimant's request for mileage reimbursement was due to his visit to Dr. M as opposed to his trips to the pharmacy, we cannot render a new decision but must remand for factual findings and development of the evidence in this regard.

As for meal reimbursement, we believe that Rule 134.6 clearly contemplates reimbursement for meals involved in medical travel, but believe the evidence is unclear as to whether the travel to Dr. M's office required meals. We also remand for further development of the evidence in this regard.

In light of our decision, the claimant's complaint that the hearing officer's decision was upon inadmissible evidence is moot.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See*

Texas Worker's Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge